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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

SOUTHERN RY. CO. v. COMMONWEALTH.

Nov. 14, 1918.

[97 S. E. 343.]

1. **Railroads (§ 99 (5)*)—Railroad Crossings—Powers of State Corporation Commission.**—The duty imposed on a railroad company, upon altering a county road for crossing purposes, to provide an equally convenient road, is a public duty imposed by Code 1904, § 1294b, cl. 3, a breach of which is within the purview of section 1313a, cl. 16, giving the state Corporation Commission authority to require the railroad company to discharge public duties imposed by law, and of clause 17, giving the commission visitatorial powers, in view of Const. § 156 (a).

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 125; 17 Va.-W. Va. Enc. Dig. 245.]

2. **Railroads (§ 99 (1)*)—Elimination of Grade Crossings—"New Construction."**—Double tracking single track railway, and erecting an embankment 10 feet high across public highway, with the substitution of an underpass for an original grade crossing, is "new construction" of railways, within Code 1904, § 1294d, cl. 38, declaring the policy of the state to eliminate grade crossings wherever practical.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, New Construction.* For other cases, see 17 Va.-W. Va. Enc. Dig. 245-6.]

3. **Railroads (§ 99 (2)*)—Elimination of Grade Crossings.**—Whether or not it is a public duty resting on a railroad company to build an undergrade crossing of a type prescribed by the state Corporation Commission depends on the circumstances of the particular case.

[Ed. Note.—For other cases, see 14 Va.-W. Va. Enc. Dig. 290; 17 Va.-W. Va. Enc. Dig. 245.]

4. **Railroads (§ 99 (11)*)—Decision of State Corporation Commission—Presumptions.**—On appeal from a determination of the state Corporation Commission, a decision requiring the railroad company to construct an underpass for a highway, it will be pre-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

sumed that such decision was *prima facie* just, reasonable, and correct.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 524.]

5. Abatement and Revival (§ 8 (1)*)—Other Suit Pending—Nature of Proceedings.—The jurisdiction of the state Corporation Commission to require a railroad company to construct an underpass for a highway is not affected because of the pendency of an injunction suit by the county supervisors against the railroad company to prevent an obstruction of the original road; the two proceedings being different as to nature and objects to be accomplished.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 16; 15 Va.-W. Va. Enc. Dig. 3.]

6 Abatement and Revival (§ 15*)—Other Suit Pending—Effect of Dismissal.—The jurisdiction of a state Corporation Commission to require a railroad company to construct an underpass for county highway is not affected by an identical injunction suit by the county supervisors for the same object, dismissed since the institution of proceedings before the commission.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 17.]

7. Railroads (§ 99 (4)*)—County Commissioners—Validity of Proceedings.—The consent of the board of county supervisors to the construction of a road underpass for a county highway held not shown under the evidence to have been obtained by the railroad company by misrepresentations.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 508.]

8. Railroads (§ 99 (4)*)—Separation of Grades—Power of County Supervisors.—A railway company may construct an underpass for a county highway by the consent of the board of county supervisors alone, under Code 1904, § 944a, cl. 1, as amended by Acts 1916, c. 276, and section 1294b, cl. 3.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 245-6.]

9. Railroads (§ 99 (1)*)—Separation of Grades—Opening and Closing of Roads.—The statutes relating to opening and closing of roads does not apply to a proceeding to require a railroad company to construct an underpass for a county highway.

10. Railroads (§ 99 (2)*)—Separation of Grades—Prerequisites.—A railway company may not construct an underpass for a county highway, although with the consent of county supervisors, unless the works of the railway company are so located and constructed as not to impair or obstruct the county road, and unless the new road is equally convenient.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 244-5.]

11. Railroads (§ 99 (2)*)—Separation of Grades—Expenses.—Where an underpass for a county highway is to be constructed at

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the request of and for the benefit of a railroad company, the company may properly be made to pay the entire expense, not only of the underpass, but the necessary approaches.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 244.]

12. Evidence (§ 20 (2)*)—Judicial Notice—War Conditions—Railroads.—On an appeal from the decision of the state Corporation Commission relating to the construction of an underpass for a county highway across a railway, the appellate court will take judicial notice of the difficulty of obtaining materials for railroad construction because of war.

Appeal from State Corporation Commission.

Action by the Commonwealth, on the relation of the State Corporation Commission, against the Southern Railway Company. From an order of the State Corporation Commission, defendant appeals. Reversed, with directions.

R. B. Tunstall, of Norfolk, and *Geo. E. Walker*, of Charlottesville, for appellant.

R. T. W. Duke, Jr., of Charlottesville, and the *Attorney General*, for the Commonwealth.

SMOOT et al. v. Bibb et al.

Nov. 14, 1918.

[97 S. E. 355.]

1. Deeds (§ 133 (2)*)—Estate Conveyed—Contingent Remainder.—Under deed conveying property to a son and his family during the life of the son, the property at son's death "to pass and descend to the children, or the children of such as may die," the children of the son took a contingent remainder.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 829, 830.]

2. Descent and Distribution (§ 12*)—Land Acquired by Purchase and Not by Descent.—Under deed conveying property to a son and his family during his life, property at his death to pass to his children, or issue of such as may die, where the son's daughter predeceased him, her surviving daughter, who died when seven years old, took as a purchaser, and her interest in the property would not, under Code 1904, § 2556, go to surviving children of son, but to her father, surviving parent, under section 2548.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 603.]

3. Deeds (§ 133 (1)*)—Construction—Rules.—The rule that the

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